

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAY 15 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Reexamination of the Comparative)
Standards for New Noncommercial)
Educational Applicants)

MM Docket No. 95-31

To: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF AMERICAN FAMILY RADIO

American Family Radio (hereinafter "AFR") offers the following Comments in response to the Further Notice of Proposed Rulemaking ("FNPR") in the captioned docket. AFR is the noncommercial educational broadcasting arm of American Family Association, Inc., a non-profit, noncommercial corporation. AFR provides noncommercial educational programming to its network of over 70 full service and translator stations.

AFR is in general agreement with previous comments that (1) current noncommercial educational ("NCE") comparative criteria are inadequate; (2) that traditional commercial comparative criteria are inappropriate for NCE applicants; (3) "time-sharing" should be eliminated from consideration in NCE comparative proceedings; (4) auxiliary power should be eliminated as a comparative criterion; and (5) a comparative coverage factor should be applied in some manner.¹ AFR also agrees with some of the comments previously submitted, as reflected in the FNPR, as set forth below. However, AFR believes that certain additional

¹FNPR, p.2

No. of Copies rec'd
List A B C D E

041

factors should properly be considered, which do not appear to have been addressed previously, and are raised in these comments.

**A LIMITED SERVICE CONTINUITY REQUIREMENT
OR "RIGHT OF FIRST REFUSAL" IS APPROPRIATE
FOR NCE APPLICATIONS**

Previous Comments submitted by National Public Radio and America's Public Television Stations ("APTS/NPR") urge the Commission to defer adoption of any service continuity requirement for NCE stations, on the assertion that the Commission's concerns are unsupported by the record.² However, the experience of AFR would tend to support the concerns of the Commission.

On several occasions, AFR has experienced submission of applications by other parties which rendered them mutually exclusive with AFR's applications. In most such cases there has been no question but that the subsequently submitting party was fully aware of AFR's application, and submitted their application primarily for the purpose speculating in mutually exclusive applications.³ Thus some limited form of service continuity is desirable as a method of curbing such practices, and allowing determination of propriety of granting licenses upon the service to the public interest, rather than on the basis of financial endurance.

Since the existence of mutually exclusive applications somewhat presumes multiple qualified applicants, AFR would propose an alternative solution to the service continuity concern. AFR respectfully submits that a three-year service continuity requirement, alone, would not adequately serve the public interest, since it does not take into account events

²Comments of National Public Radio and America's Public Television Stations, GC Docket No. 92-52, p. 3.

³Not necessarily for direct financial gain, but to restrict the ability of AFR to proceed, or to obtain advantage in negotiations in another geographic area.

occurring after the comparative proceeding. However, the three-year service continuity requirement would tend to minimize the abuse of the filing of mutually exclusive applications. Thus, AFR would suggest the adoption of a procedure whereby a three-year continuity of service requirement be imposed, modified so an applicant who fails to put the station into service, or a licensee who desires to transfer the license, or suspend or terminate service, within the same three-year period would be required to notify the Commission, who would then give notice to any qualified applicants who were involved in the comparative proceeding that the transfer was proposed, and updated applications should be provided if the applicant desired to be considered for the transfer. If the applicant remained qualified, they could be given a "right of first refusal" to become the transferee of the license on such terms as the Commission might approve.

This procedure would remove the incentives for abuse of the mutually exclusive application process, and would assure fundamental fairness to the unsuccessful applicant.

**THE PROPOSED APTS/NPR CLARIFYING GUIDELINES
ARE NOT ENTIRELY APPROPRIATE**

The first "clarifying guideline" submitted by APTS/NPR is that of determining which applicant will best integrate the station operations with its educational and cultural objectives.⁴ The criteria suggested, clear and definable educational and cultural objectives, objectives directed outwardly toward the community of license rather than exclusive to the licensee, and adequate description of program format and evidence it can implement the service, amount to little more than the requirement that the applicant be qualified as an NCE broadcast station owner. Moreover, the ambiguity of the language suggested leads to a high likelihood of

⁴FNPR, p.2.

differing interpretations as to whether a particular applicant has subjectively suitable “cultural objectives” or its objectives are “directed outwardly.” Application of these “standards” is analogous to the matters invalidated in *Bechtel v. F.C.C.*, 10 F.3d 874 (D.C. Cir. 1993).

AFR would suggest that these considerations be evaluated only insofar as they determine whether an applicant is qualified, at all, rather than to assist in differentiating between qualified applicants. Once an applicant is determined to be qualified, this form of an “integration” determination should be complete.

Of greater concern would be which applicant best meets community needs. This question must be objectively answered, while being cognizant of the criticisms of *Bechtel*. AFR agrees with APTS/NPR’s first two considerations in this regard: that an applicant have in place a reasonable method of determining the educational and cultural needs of the service area, and that the proposed services and objectives will meet those needs.

The third consideration, existence of a governing board that is broadly representative of the community to be served, or, in the case of state/local licensees, is accountable to the public, is more problematic. There is no quarrel with the idea that government licensees have a board accountable to the public. However, the requirement that each private licensee have a governing board that is representative of the community of license has two objections. First, this is, at least to some degree, duplicative of the first consideration, a reasonable means of determining local needs and meeting them. As such, the “reasonable means” to meet this valid end should be left to the licensee, not compelled by this requirement of a substantially local governing board. Second, this requirement runs counter to the concerns of the D.C. Circuit Court of Appeals in *Bechtel*, with respect to integration of ownership and management. It is the NCE parallel to preferring a local owner/manager over another, when

the first two considerations, of providing reasonable means to ascertain and meet local needs should adequately meet these concerns.

Consequently, AFR respectfully submits that this consideration not be relied upon in determining comparative criteria.

APTS/NPR also suggested other factors be considered. Thus far AFR would agree. However, the factors stated to be included (common ownership of NCE facilities, bringing service to unserved or underserved areas, and fully using available technology) are, with the exception consideration of bringing service to unserved or underserved areas) of questionable value in evaluating mutually exclusive applications.

To apply the considerations of common ownership of NCE facilities and full usage of available technology is to predetermine that larger, wealthier NCE applicants are to be preferred over smaller, poorer applicants. If an applicant meets the financial qualifications of the Commission to build and/or operate the proposed facility, common ownership of other stations is irrelevant. Similarly, the preference for full utilization of available technology may prevent an otherwise financially qualified small applicant from obtaining a license. This is a particular concern in unserved or underserved areas, where the use of state of the art technology may not be the most practical way to serve the community.

Accordingly, the common ownership of other NCE stations, while valuable in determining the minimal financial qualifications of the applicant, and exhibiting the ability of the applicant to implement its programming and objectives, has no relation, in itself, to any preference of that applicant in a mutually exclusive setting, and should not be considered a relevant basis for a preference.

**THE PROPOSED POINT SYSTEM DOES NOT
CONFER NEEDED OBJECTIVITY**

The Comments of National Federation of Community Broadcasters ("NFCB") purport to assign points for several different factors. However, without a detailed and rational factual basis for the relative point assignments, these point values are as "arbitrary and capricious" as the "objectivity" of the integration criterion called "illusory" by the Court in *Bechtel*.

Of the factors suggested for consideration by NFCB, two (local program origination and local residence of principals) are, in essence, a reformulation of the "reasonable means" of determining service needs, and, as such, simply make mandatory a matter which should be left to the sound business judgment of the applicant. The role of the Commission should be simply to determine if the means chosen by the applicant are a reasonable approach to the desired end. Otherwise, like the local board component of APTS/NPR's proposal, it runs afoul of *Bechtel*. Similarly, diversification is a criteria which adds only a subjective and ethereal component, subject to challenge as arbitrary and capricious.

The valid considerations raised by NFCB (spectrum efficiency - coverage comparison- and finder's preference) are appropriate, but, as above, no basis for the apparently arbitrary allocation of point values can be given. This certainly militates against utilization of a point system, absent a clear statement of the basis on which points are assigned each factor.

AFR'S PROPOSED FACTORS FOR CONSIDERATION

Based upon the information provided by each applicant in its application, the initial determination should simply be whether each competing applicant meets the legal and financial qualifications required. If not, the application of any unqualified applicant may be dismissed.

Among competing qualified applicants, then, the following factors should be considered:

1. The existence of a reasonable process for determination of the educational and cultural needs of the community;
2. A reasonable means for ascertaining that the proposed services will be able to progress toward meeting those needs;
3. Comparative coverage should be evaluated to determine whether any difference in proposed coverage is significant;
4. The ability to bring service to unserved or underserved areas (including reference to existing service with either the same or different programming formats), with a preference for those whose service will not duplicate existing service;
5. A finder's preference for the applicant whose application was first filed; and
6. A preference for an applicant which demonstrates that it has established an audience in a significant portion of the proposed community.

Factors 1 through 4 are substantially in agreement with considerations suggested in the comments of APTS/NPR and/or NFCB. The finder's preference is important because of the inherent inequity in the possibility that a qualified applicant who has performed the work necessary to submit a proper application, and has located the available channel, may be precluded from receiving assignment of the channel on the basis of factors which may amount to no more than that the competing applicant is more wealthy. Any inability to perform would be addressed through the proposed service continuity and "right of first refusal" requirement.

Factor 6, an established audience, is very important in the consideration of community needs. In some cases the applicant may have an established audience in the community, for example by virtue of a translator station carrying a NCE signal. The needs of the community, and the protection of the audience, then require that a preference be given for such an established audience.

The assignment of points to these factors would be entirely subjective, unless data can be accumulated to demonstrate the absolute relationships of the factors to each other in importance. Indeed, experience and reason both indicate that these factors are best viewed in light of the particular needs of the community at issue. For example, in a small, rural community without service, factor 4, above, would be of great importance. In a community with some service, it would be less important, and in an area where there is a great diversity of service its import would be negligible.

In any event, AFR submits that the proposed service continuity and "right of first refusal" requirement be implemented, to discourage improper application, and to assure that the unsuccessful applicants in a comparative proceeding would have some measure of priority in seeking transfer of the permit or license if transfer be sought within the first three years after completion of the proceeding.

OTHER MATTERS

As mentioned above, AFA does not believe a point system will assist in processing such proceedings. In addition, a "share time" arrangement is unsuitable to NCE programming.

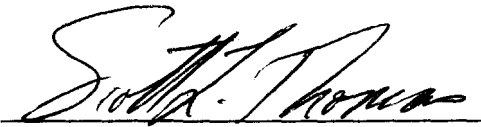
AFR submits that adoption of the factors proposed above would not prejudice applicants whose proceedings have been held in abeyance. However, to avoid any possible prejudice, a one-time as-of-right amendment would certainly cure any such difficulty.

CONCLUSION

For the reasons set forth above, AFR respectfully submits that the existing NCE comparative criteria should be modified in accordance with the comments herein submitted.

Dated: May 12, 1995

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Scott L. Thomas", written over a horizontal line.

Scott L. Thomas
General Counsel

American Family Radio/
American Family Association, Inc.
P.O. Drawer 2440
Tupelo, MS 38803
(601) 844-5036